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No. 01-1596

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Cross-Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF CROSS-APPELLEES BEATRICE BRANCH, ET AL.

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QUESTION PRESENTED

When a state loses a Representative in Congress and state authorities fail to produce a redistricting plan, must the federal courts require at-large elections for the state's Representatives even though the courts have sufficient time to implement a single-member redistricting plan prior to the next election?

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This brief is filed on behalf of cross-appellees Beatrice Branch, Rims Barber, L.C. Dorsey, David Rule, James Woodard, Joseph P. Hudson, and Robert Norvel. They are the plaintiffs in the state court proceedings, the intervenors in the Federal District Court proceedings now under review in this Court, and the appellants in No. 01-1437. The state defendants, who also are cross-appellees, have not filed any briefs in this Court. The cross-appellee Mississippi Democratic Executive Committee submitted a letter to the Clerk stating that it supports the position of the cross-appellees Beatrice Branch, et al.

In this cross-appeal, the Mississippi Republican Executive Committee (MREC) and the federal court plaintiffs contend that while the Federal District Court properly enjoined the use of the state court plan, it should have imposed at-large elections for Mississippi's members of Congress pursuant to 2 U.S.C. § 2a(c) rather than devise a single-member district plan. This issue will be relevant only if this Court affirms the District Court's injunction against the state court plan in the course of resolving the main appeal (No. 01-1437).

SUMMARY OF ARGUMENT

1. This claim has been waived because the cross-appellants failed to object to the absence of at-large elections when the District Court announced its single-member district plan on February 4. Pursuant to the District Court's order of that date, any "failure to object in accordance with this order will be deemed a waiver of all further objections to this plan."

2. 2 U.S.C. § 2c, passed in 1967, requires the establishment of single-member districts and provides that "Representatives shall only be elected from Districts so established." As is clear from the language, the historical context, and the legislative history, this law was passed to end at-large elections for members of the United States House of Representatives, including at-large elections ordered by federal courts as remedies for malapportionment in the wake of

Wesberry v. Sanders, 376 U.S. 1 (1964). The imposition of at-large elections pursuant to the 1941 provisions of 2 U.S.C. § 2a(c) would flatly contradict the 1967 statute. Either the 1967 law implicitly repeals the one from 1941, or leaves it in place for election eve emergencies where neither a legislature nor a court has devised a lawful single-member plan. Either way, the District Court here properly declined to impose at-large elections on the State of Mississippi.

3. Nothing about § 2c suggests that courts are not to enforce its provisions. The language does not tell courts to ignore the statute. By 1967, when the law was passed, courts were becoming very involved in congressional redistricting disputes, and Congress knew that. The floor debates show that members of Congress believed the courts would adhere to and enforce the statute. Federal courts have a duty to enforce federal law, and this law is no exception. If it were otherwise, states could ignore the Congressional prohibition against at-large elections in § 2c with impunity.

4. Even if at-large elections in Mississippi were otherwise required by § 2a(c), they would reduce and dilute minority voting strength in violation of the Voting Rights Act. According to the cross-appellants' theory, the at-large election requirement of § 2a(c) is triggered by the Mississippi legislature's decision not to adopt a single-member plan. If so, the legislature's decision is subject to review under the Voting Rights Act. Because any resulting at-large elections would violate the Act, it would be improper for a court to impose them

ARGUMENT

I. THE AT-LARGE CLAIM HAS BEEN WAIVED.

In their complaint, the federal court plaintiffs requested at-large elections or, in the alternative, a federal court-ordered redistricting plan. In a January 16, 2002 pretrial hearing, the Federal District Court indicated that it would not impose at-large elections. J.A. 26-27. In its February 4, 2002 order announcing its redistricting plan, the Federal District Court said: "The parties are directed to show cause by written objections [filed by February 9], why this court's redistricting plan . . . would not satisfy *all* state and *federal statutory* and constitutional *requirements. . . Failure to object in accordance with this order will be deemed a waiver of all further objections to this plan.*" No. 01-1437, J.S. App. 62a-63a (emphasis added).

In response, the federal court plaintiffs and the MREC filed comments saying the plan "satisfies all constitutional and statutory criteria." Comments of the Plaintiffs and Mississippi Republican Executive Committee, dated Feb. 8, 2002 (a copy is included in the appendix to the Conditional Motion to Affirm filed in this cross-appeal). Neither at that point nor any later point did they object to the failure to require at-large elections. Thus, under the terms of the District Court's February 4 order, these cross-appellants "waiv[ed] all further objections to this plan."

II. 2 U.S.C. § 2c MANDATES SINGLE-MEMBER CONGRESSIONAL DISTRICTS AND ALLOWS NO ROOM FOR COURT-ORDERED AT-LARGE ELECTIONS EXCEPT PERHAPS IN AN ELECTION EVE EMERGENCY.

2 U.S.C. § 2a(c), passed in 1941, reads as follows:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives . . . shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the state at large and the other Representatives from the districts then prescribed by the law of the State . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2c, passed in 1967, reads as follows:

> In each State entitled . . . to more than one Representative . . ., there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and *Representatives shall be elected only from Districts so established*, no district to elect more than one representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

(Emphasis added). The parenthetical at the end of § 2c permitted New Mexico and Hawaii to elect their representatives at large in the 1968 election but required them to use single-member districts thereafter.

The language, historical context, and legislative history of the 1967 statute, § 2c, demonstrate that it strictly mandates

single-member congressional districts and does not permit court-ordered at-large elections except perhaps in an election eve emergency. It either supersedes §2a(c) entirely or leaves it in place for situations, increasingly unlikely in the computer age, where legislatures fail to adopt lawful plans and courts do not have sufficient time to implement single-member remedies.

As specified by the 1967 statute, every state in the union with more than one United States Representative elects them from single-member districts. Since passage of the statute, courts confronted with congressional redistricting cases consistently have drawn single-member district plans rather than impose at-large elections, even when states have lost or gained seats.

The position advocated by the cross-appellants would change that. If they are correct, congressional elections in a number of states where courts imposed redistricting plans after a loss or gain of seats will convert from districts to total or partial at-large balloting, including Mississippi, Texas, and Colorado. *See, Balderas v. Texas*, No. 6:01cv158 (E.D. Tex. Nov. 14, 2001) (three-judge court), *aff'd mem.*, 122 S.Ct. 2583 (2002) ; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). This would also mean that federal courts should have ordered New York to elect its 31 representatives at large in 1992 after it lost seats and the legislature initially deadlocked, and should have ordered Illinois to elect its 20 representatives at large in 1992 when its legislature could not agree on a solution after seats were lost. *See, Puerto Rican LDEF v. Gantt*, 796 F.Supp. 681 (E.D.N.Y. 1992) (three-judge court) (requiring implementation of a single-member districting plan in New York); *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991)

(three-judge court) (requiring single-member plan in Illinois).[1] Similarly, in any Section 5 state where a seat is lost, at-large elections will be required if the legislature passes a plan but the plan is not precleared in a timely fashion, either because of the sort of Justice Department political mischief that occurred in Mississippi this year (see No. 01-1437, Brief for Appellants at 41-43) or because the United States Attorney General objects to a plan that truly is retrogressive and discriminatory.

But federal law does not require this unprecedented result. Instead, it prohibits it. As just mentioned, 2 U.S.C. § 2c, passed in 1967, mandates that "Representatives shall be elected *only from Districts*" in states with more than one representative. (Emphasis added). The language of the statute is definitive. The only exception was for New Mexico and Hawaii, and then only for one additional election.

In dictum in *Whitcomb v. Chavis*, 403 U.S. 124, 159 n. 39 (1971), this Court described the historical background of the statute:

> In 1842, Congress by statute required single-member districts for congressional elections. The substance of the restriction was continued . . . until 1929. In 1941, Congress enacted a law that required that until a State is redistricted in a manner provided by law after decennial reapportionment of the House, representatives were to be

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[1] After initially being unable to agree on a plan, and after both a state court and a federal special master adopted plans, the New York legislature eventually reached agreement and enacted the state court plan as its own. That plan was used in the 1992 elections. *Puerto Rican LDEF v. Gantt*, 796 F.Supp. 698, 699 (E.D.N.Y. 1992) (three-judge court). But prior to that late development, the federal court was faced with a legislative stalemate over how to redistrict the state after the number of representatives was reduced from 34 to 31. In that situation, the court devised a single-member plan.

> elected from the districts prescribed by the law of the State, and that "if any of them are elected from the state at large they shall continue to be so elected," provided that if . . . a State is entitled to an increase in the number of representatives, the additional representatives shall be elected at large until the State is redistricted, and if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. *In 1967, Congress reinstated the single-member district requirement* . . . .

(Emphasis added, citations omitted).

The 1967 statute was passed against the backdrop of this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), after which the validity of a number of congressional redistricting plans was thrown into doubt. Several courts responded by threatening to impose at-large congressional elections, and most of them referenced 2 U.S.C. § 2a(c). *See, e.g., Preisler v. Secretary of State of Missouri*, 257 F. Supp. 953, 981 (W.D. Mo. 1966) (three-judge court), *aff'd mem.* 385 U.S. 450 (1967); *Bush v. Martin*, 251 F. Supp. 484, 490 (S.D. Tex. 1966) (describing prior order); *Park v. Faubus*, 238 F. Supp. 62, 65-66 (E.D. Ark. 1965). As is clear from the legislative history of the 1967 statute, Congress then decided to require single-member districts in all instances (except in the next election in Hawaii and New Mexico) and to prevent courts from ordering at-large elections as a remedy for malapportionment. Senator Baker, the sponsor of the bill, made this plain a number of times prior to initial passage in the Senate, in both his own statements and in a colloquy with Senator Bayh:

> Mr. BAKER. . . . [This bill] strictly provides in a

> straightforward manner than when there is more that one Member of the House of Representatives from a State, the State must be redistricted, and that the Members may not run at large.

113 Cong. Rec. 31718 (1967).

> Mr. BAYH. . . . When we say "as amended, there shall be established by a law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from Districts so established, no district to elect more than one Representative," we are talking about either of two situations — whether the legislature reapportions or whether the court reapportions.
>
> Mr. BAKER. The Senator is correct.
>
> . . . .
>
> Mr. BAYH. . . . I just wish to make one brief comment in summary, in light of this colloquy. This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal court.
>
> Mr. BAKER. That is my understanding

Id. at 31720.

The Senate initially passed the single-member bill in a form that allowed no exceptions for any states. In a general discussion of the importance of the bill when it reached the House, Representative Jacobs noted that the delegation in his home state of Indiana "faces the very serious threat of running at-large." *Id.* at 34037. He emphasized that the bill would prohibit at-large elections and would make it clear to federal courts that, if required to impose a remedy for

malapportionment, they must order single-member districts:

> Mr. JACOBS. Mr. Speaker, I doubt very seriously that there is much disagreement with the need for a law to prohibit at-large elections, generally, in the United States. . . . If this bill should become law, then in any State whose districts are declared unconstitutional a court could draw district lines and true up those districts that they deemed to be unconstitutional.

Id.

The House amended the bill so that Hawaii and New Mexico were permitted to conduct at large elections for one more cycle. When it returned to the Senate for further action, several senators discussed the reason for the bill:

> Mr. BAYH. . . .There is a great likelihood that, if agreement cannot be reached within a State, the court could well order the entire congressional delegation to run at large. The purpose of this particular bill is to avoid this possibility.

Id. at 34366.

> Mr. INOUYE. . . . This bill, as I see it, is framed only for States such as Indiana; under court order to elect their Representatives at large. This bill would relieve these States of this necessity. . . .

Id. at 34367. The Senate then passed the bill with the one-election exception for Hawaii and New Mexico that had been added by the House. *Id.* at 34369. *See also, Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal.) (discussing legislative history), *appeal dismissed*, 456 U.S. 941 (1982); *Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo.) (three-judge court) (discussing legislative history), *aff'd*

mem., 456 U.S. 966 (1982).

In light of the language of the bill and this legislative history, most of the lower courts addressing the issue have held that the 1967 statute supersedes the one from 1941. Shortly after passage of the 1967 statute, the three-judge court overseeing the Missouri redistricting case held that the new law relieved it of the obligation to follow 2 U.S.C. § 2a(c)(5), allowing it to vacate its earlier threat of at-large elections and instead implement a proper single-member plan if the legislature failed to do so. *Preisler v. Secretary of State of Missouri*, 279 F. Supp. 952, 967-969 (W.D. Mo. 1967), *aff'd sub nom. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). Other courts have agreed. *Shayer v. Kirkpatrick*, 541 F.Supp. at 926-927; *Assembly of California v. Deukmajian*, 639 P.2d at 954-955.

The cross-appellants cite only one case to the contrary, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), and even it does not support their position. In *Carstens*, the Court held that § 2c did not repeal § 2a(c), but instead left the provisions of § 2a(c) in place for use "in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77-78. In the present case, of course, there was time for the courts to develop a plan and there was no need to resort to the drastic step of at-large elections.

Nevertheless, the cross-appellants suggest that while § 2c may express a general preference for single-member districts, § 2a(c) provides the only remedy when the legislature fails to enact a lawful plan. (Br. 14, 17-18). But an examination of the 1941 statute shows that it survives, at most, as an emergency measure. § 2a(c) sets out various scenarios that are triggered

when elections occur before "a State is redistricted in the manner provided by the law thereof after any apportionment." § 2a(c)(1) says that when "there is no change in the number of Representatives, they shall be elected from the districts then prescribed . . . and if any of them are elected . . . at large they shall continue to be so elected." Under the cross-appellants' reading, Hawaii could have maintained at-large elections after 1968 irrespective of the prohibition in § 2c so long as it continued to decline — as it had declined immediately after the 1960 apportionment — to "redistrict[] in the manner provided by the law thereof." A federal court could have done nothing about it, according to the cross-appellants. Furthermore, § 2a(c)(1), if taken literally, would allow states to continue to use malapportioned pre-existing districts, again by the simple expedient of declining to redistrict. (The cross-appellants concede that this would violate the equal population principle of Article I, § 2 and that § 2a(c)(1) no longer remains viable in that respect. (Br. 17)).

§ 2a(c)(2), provides that "if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of the such State." But as the cross-appellants concede, the existing districts would violate the equal population requirement of Article I, § 2 in such a situation. (Br. 17). Absent an emergency, a court clearly must redraw those districts if the state legislature fails to do so. Under the cross-appellants' view, however, fidelity to the remainder of § 2a(c)(2) would require the court to redraw only the existing number of districts, leaving the new Representatives to be elected at large notwithstanding the command of § 2c.

Thus, for the cross-appellants, § 2c's single-member requirement is a complete nullity if a state (in the words of §

2a(c)) chooses not to "redistrict[] in the manner provided by the law thereof after any apportionment." If the state gains or loses seats, at-large elections will be utilized despite § 2c. If the state maintains the same number of seats, it will be redistricted, but only because the Constitution requires it. § 2c has no relevance, according to the cross-appellants, to any situation where a state has failed to enact a lawful redistricting plan.

But as is clear from the consequences of the various provisions of § 2a(c), this makes no sense. The scenarios described a moment ago completely contradict the explicit language, historical context, and legislative history of § 2c. That statute abolishes at-large congressional elections entirely except the single exception that allowed Hawaii and New Mexico to use them in 1968. Although § 2a(c) remains on the books, it stands at most as a backstop for election eve emergencies of the type that are increasingly unlikely to occur as redistricting technology improves.[2]

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[2] Although this leaves § 2a(c) of little practical value, this is not unprecedented. The current law books occasionally include provisions that have grown to be anachronisms. *See, e.g.*, 2 U.S.C. § 6 (1872 statute, never repealed, requiring reduction of the number of Representatives apportioned to a state if the state denies "the right of any of the male inhabitants thereof" to vote in certain elections).

The cross-appellants cite *Smiley v. Holm*, 285 U.S. 355 (1932), where this Court ordered at-large elections when a seat had been lost even though the 1911 federal redistricting statute provided that Representatives "shall be elected by districts." *Id.* at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. But not long thereafter, this Court held in *Wood v. Broom*, 287 U.S. 1, 7 (1932), that the districting provision of the 1911 statute had expired when it was not renewed in 1929, thus rendering it inoperative at the time of *Smiley*. By contrast, the 1967 single-member requirement of § 2c is alive and well at the present time. Furthermore, *Smiley* was decided in the era of *Colegrove v. Green*, 328 U.S. 549 (1946),

Ultimately, this Court need not decide whether the 1967 statute completely repealed the 1941 statute, or whether the two peacefully coexist in the manner described in *Carstens*. Either way, the District Court here acted properly in not imposing at-large elections.

III. THE COURTS HAVE THE AUTHORITY TO ENFORCE THE SINGLE-MEMBER REQUIREMENT OF 2 U.S.C. § 2c.

According to the cross-appellants, § 2c "gives no direction to courts" and its provisions are to be enforced only by legislatures, not courts. Therefore, they say, the District Court here had no business imposing a single-member district plan. (Br. 23). Of course, courts enforce federal statutes all the time even though the words of the statutes do not"give [them] direction." Most federal statutes that are binding upon states — such as Section 2 of the Voting Rights Act, 42 U.S.C. § 1973c — do not explicitly refer to courts. Yet courts enforce them when the states do not.

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when the general understanding was consistent with Justice Frankfurter's statement that "no court can affirmatively re-map the . . . districts" for members of Congress or other public officers. *Id.* at 533 (opinion of Frankfurter, J.), *see also id.* at 565 (Rutledge, J., concurring). While courts at the time of *Smiley* and *Colegrove* would not consider designing redistricting plans to enforce a single-member requirement, the landscape had changed by 1967. *See, Reynolds v. Sims*, 377 U.S. 533, 586-587 (1964) (remedial options for one-person, one-vote violations include court-ordered plans). It was understood by members of Congress and judges alike that, with the 1967 act, federal judges were expected to enforce its provisions by crafting new single-member district plans when appropriate. Thus, any decision by the *Smiley* court to decline enforcement of the 1911 single-member requirement has no relevance to the 1967 statute and the authority of the present-day federal courts to implement single-member plans.

Indeed, § 2c would be rather toothless if states that lost seats could avoid the single-member district requirement simply by declining to pass a redistricting plan. The cross-appellants say that "§ 2a(c) provides the remedy for the violation of § 2c by legislative inaction."(Br. 6). But the "remedy" that § 2a(c)(5) would provide is one of at-large elections, which is what the single-member district requirement of § 2c is designed to preclude. It seems strange that the remedy for the violation of a statute would be the imposition of that which the statute seeks to avoid.

Moreover, if courts cannot enforce the provisions of § 2c, passed in 1967, it would follow that they also cannot enforce the provisions of the statute upon which cross-appellants rely — § 2a(c)(5), passed in 1941 — inasmuch as the language of the latter does not explicitly direct itself to courts. That, of course, would be fatal to the cross-appellants' claim here, since they are asking the federal courts to order Mississippi to conduct its elections at-large in the name of the 1941 statute.[3]

Yet the cross-appellants contend that the phrase "by law" from § 2c is what demonstrates that Congress, when passing that provision in 1967, intended that it only be enforced by legislatures and not courts. But surely those words do not mean

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[3] In an interesting twist, the cross-appellants seem to take the position that they have no "private right of action to enforce § 2a(c)." (Br. 25 n.14). Rather, they suggest, the Federal District Court properly enjoined use of the pre-existing five-district congressional redistricting plan because of its infirmities and, in the course of devising a remedy, should have mandated at-large elections so that the remedial scheme complied with § 2a(c). *Id.* But the same would hold true for the single-member district requirement in § 2c. Even under the cross-appellants' theory that there is no right of action under § 2c, the federal court nevertheless should, as a remedial principle, draw a plan consistent with the statute's single-member requirement.

that courts — entrusted with implementing federal law when states fail to do so — should abstain with respect to this one particular statute. If the words did carry that meaning, there would be no recourse if one or more state legislatures — even in states that gained or lost no seats — blatantly disregarded § 2c and passed laws instructing their election officials to elect all representatives at-large. Surely the statute is not so easily evaded. If Congress had intended in 1967 to preclude federal courts from enforcing this statute, it would have said so in words much more explicit than these.[4]

Indeed, the cross-appellants admit that "by 1967, courts had begun to act, taking control of redistricting decisions after *Baker [v. Carr*, 369 U.S. 186 (1962)] and *Wesberry [v. Sanders*, 376 U.S. 1 (1964)]." (Br. 23). As illustrated by the earlier quotations in this brief from the 1967 legislative history, the primary purpose of § 2c was to mandate single-member districts and require courts to employ them in remedial plans rather than impose at-large elections. It defies reason to suggest that Congress did not intend courts to enforce the single-member requirement of this 1967 statute.

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[4] The cross-appellants refer to a proposed version of the statute offered by Senator Bayh that did not include the words "by law." (Br. 19, citing 113 Cong. Rec. 31,718 (1967)). But the Congressional Record shows that much of the debate over the different versions offered by Senators Bayh and Baker was over their respective treatment of Hawaii and New Mexico. *Id.* 31718-31719. To the extent they discussed the words "by law" in Senator Baker's proposal, both Senators Bayh and Baker agreed that those words would not preclude courts from enforcing the new statute and implementing single-member plans to remedy problems of malapportionment. *Id.* 31719-31720.

IV. THE IMPOSITION OF AT-LARGE ELECTIONS IN MISSISSIPPI WOULD VIOLATE THE VOTING RIGHTS ACT.

Finally, even if the cross-appellants were otherwise correct, the imposition of at-large elections in Mississippi would lead to a dilution of black voting strength in violation of Section 2 of the Voting Rights Act as well as retrogression in violation of Section 5 of the Act, 42 U.S.C. § 1973. Mississippi presently elects one of its Representatives from a majority-black district. Statewide, however, the population is 61% white and 36% black. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *aff'd mem.*, 469 U.S. 1002 (1984) (electing all members of Congress in Mississippi from majority-white districts violates Section 2).

The cross-appellants say that the Voting Rights Act does not apply to acts of Congress. They cite *Young v. Fordice*, 520 U.S. 273, 290 (1997), where this Court said "[t]he decision to adopt the . . . federal registration system is not . . . a change for the purposes of § 5, for the State has no choice but to do so." However, even if federal law requires at-large elections when a legislature declines to redistrict, this is not a situation where the legislature "ha[d] no choice." The legislature could have maintained districts by passing a plan. The legislature's decision not to do so, and the resulting implementation of at-large elections, would be subject to scrutiny under the Act.

Otherwise, legislatures in states that lost seats in Congress could easily avoid the requirements of the Voting Rights Act by refusing to adopt a plan. This would, if the cross-appellants are correct, put the election of all members of Congress from such a state in the hands of the majority-white statewide electorate, and minority citizens would be without recourse. But Congress passed the Voting Rights Act in 1965, and amended Section 2

of the Act in 1982, with a recognition of the potential for dilution caused by at-large elections. *See, Allen v. State Board of Elections*, 393 U.S. 544, 564-569 (1969); *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986). One of the more pervasive tools of racial discrimination employed by Mississippi and other southern states was the conversion of elections for particular groups of officeholders from district to at-large balloting. *See, e.g., Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (striking down as purposefully discriminatory a 1962 Mississippi statute requiring municipal alderman to be elected at large rather than from districts). There is nothing to suggest that Congress left a loophole in the Voting Rights Act by which those states could use that very gambit to dilute minority voting strength in elections for the United States House of Representatives.

Moreover, even if the state's inaction were immune from Voting Rights Act review, the cross-appellants concede that the Federal District Court, in adopting a remedial plan to replace the invalid pre-existing plan, was required to conform its remedy to the Voting Rights Act. (Br. 25 n.14, *citing, Abrams v. Johnson*, 521 U.S. 74, 96 (1997)). That being the case, the District Court cannot impose at-large elections. Of course, the cross-appellants also contend that the District Court was required to follow §2a(c) and implement at-large voting. (Br. 25 n.14). To the extent the District Court is required to consider both statutes, the Voting Rights Act — which is the more recent enactment — is the one that must be followed.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the District Court should be affirmed to the extent the Court declined to impose at-large elections for the members of the United States House of Representatives from Mississippi.

Respectfully Submitted,

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